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No. 93-999

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

POLITICAL CONTRIBUTIONS DATA, INC.,
Respondent.

On Petition for a Writ of
Certiorari to the United States
Court of Appeals for the Second Circuit

MEMORANDUM OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

This petition arises from a ruling by the Second Circuit that respondent is entitled to an award of attorneys' fees under the Equal Access to Justice Act ("EAJA"). Under the EAJA, a prevailing party is generally entitled to a fee award against the government unless the government can show that its position was "substantially justified." The question presented for review is:

Did the court of appeals correctly conclude that, in this "unusual situation where a previous panel has passed on every question" and determined that the petitioner's position "def[ied] the will of Congress and jeopardiz[ed] First Amendment rights," it need not reexamine the merits of the underlying litigation in order to determine that the agency's position was not "substantially justified?"

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MEMORANDUM FOR RESPONDENT IN OPPOSITION

STATEMENT

In order to understand why review is not warranted in this case, it is necessary to recount briefly the history of this litigation, including the proceedings before the lower courts on both the merits of the case and respondent's application for an award of attorneys' fees and litigation expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d).

1. *Background*. This case was an enforcement action brought by petitioner Federal Election Commission ("FEC") against respondent Political Contributions Data, Inc. ("PCD"), challenging PCD's right to sell reports analyzing

contributions to federal election campaigns. The FEC claimed that the sale of PCD's reports violated § 438(a)(4) of the Federal Election Campaign Act, 2 U.S.C. § 438(a)(4), which requires the FEC to make available to the public lists identifying individuals who contribute more than $200 to federal election campaigns, but goes on to state that contributor information "may not be used by any person for the purpose of soliciting contributions or for commercial purposes." PCD's reports were based on data obtained from the FEC, but were then combined with other publicly available information and refined to produce two types of reports that contained information that was unavailable from the FEC.

First, PCD produced Corporate Affiliation Contributor Reports, which analyzed the contributions made by officers and high-level employees of the 700 largest corporations in the United States. Pet. App. 80a. By revealing the extent to which candidates drew their support from individuals connected with certain industrial groups (*e.g.*, agriculture, defense contractors, or insurance), these reports shed light on the interests to which the candidates may be responsive. Second, PCD produced Congressional District Reports for each of the 435 congressional districts. These reports contained the name of each major contributor ($500 or more), the recipient, the contributor's occupation, and the amount of each contribution. *Id.* These reports enabled the reader to track the impact of major contributions on each congressional campaign, and the degree to which residents of one congressional district supported candidates in other districts.

None of PCD's reports contained mailing addresses or telephone numbers of contributors. Each page of every PCD report included a warning, reproduced in full at Pet. App. 80a, that use of the reports for "the purpose of soliciting contributions or for any commercial purpose" was forbidden. PCD's promotional material also cautioned that FEC records are generally "seeded" to detect unauthorized use; that is,

they contain fictitious names to alert the candidate or committee that submitted the list that it is being used for an unauthorized purpose. *Id.*

2. *FEC Proceedings*. Before PCD was organized, its parent corporation, Public Data Access, Inc. ("PDA"), requested an advisory opinion from the FEC on whether publication of the reports was prohibited by § 438(a)(4). PDA pointed out that the legislative history of that section makes it clear that the sole concern underlying the prohibition in § 438(a)(4) is to protect contributors to federal campaigns from a barrage of solicitations. PDA emphasized that it had no interest in engaging in or facilitating solicitation activities, but instead sought to promote the use of contributor data to stimulate research and reporting on patterns of political contributions. PDA also stressed that its reports would be useless to list-brokers and others because, without street addresses or telephone numbers, PDA's reports could not be used for solicitation purposes. Most fundamentally, PDA argued that its right to publish this information -- which was public by operation of law -- was secured by the First Amendment.

In Advisory Opinion 1986-25, the Commission determined that the sale of PDA's reports would violate the Act. Pet. App. 81a. The central reason given was that, because PDA is organized as a for-profit corporation, its sales of these lists are presumably made for commercial purposes. Pet. App. 50a. The FEC also rejected PDA's claim that it fell within the exception in the FEC's regulations permitting certain for-profit media organizations to publish contributor information, provided that the use of such information is "incident" to the sale of their communications. 11 C.F.R. § 104.15(c). The Advisory Opinion did not address PDA's First Amendment argument. In fact, during the FEC's deliberations on the draft Advisory Opinion, Commissioner Josefiak insisted that he was "not getting into whether or not that's constitutional," and Commissioner Harris stated that "I don't think it is an easy

case at all and I think we have a very hard time trying to enforce the statutory provisions without getting into problems under the First Amendment." *See* Joint Appendix in *FEC v. PCD*, No. 91-6084 (2d Cir.) at 160-61.

Following the issuance of the Advisory Opinion, PCD continued to distribute the reports. On November 10, 1986, the Republican Congressional Campaign Committee filed a complaint with the FEC alleging that the distribution of PCD's reports violated § 438(a)(4). Pet. App. 81a. The complaint did not point to a single instance in which a contributor received a solicitation attributable to a PCD report.

In March 1987, the FEC determined that there was reason to believe that PCD had violated § 438(a)(4). Pet. App. 81a. A lengthy investigation by the FEC's General Counsel ensued, and PCD was compelled to respond to extensive interrogatories and produce hundreds of records. The investigation uncovered no evidence that any recipient of PCD's reports had used them for solicitation purposes. Nevertheless, on May 9, 1989, the Commission voted to initiate this proceeding.

3. *Litigation on the Merits*. This action was filed by the FEC on August 9, 1989, in the United States District Court for the Southern District of New York. The complaint alleged that PCD had violated § 438(a)(4) by using individual contributor data copied from reports filed with the FEC for commercial purposes, and sought injunctive relief and civil penalties. Pet. App. 82a. The FEC again took extensive discovery, which overlapped with and expanded upon the discovery it had taken before the Commission. FEC lawyers deposed each of PCD's principals and one of its customers, and requested the production of all documents that bore any relation to the creation of the reports, PCD's sales and marketing efforts, or PCD's customers. Following discovery, both parties moved for summary judgment.

The district court granted summary judgment to the FEC, concluding that the FEC's construction of the Act is entitled to deference, and that the FEC's determination that the sale of PCD's reports violated § 438(a)(4) was not unreasonable. Pet. App. 46a-62a. At the FEC's urging, the court applied the commercial speech doctrine and rejected PCD's constitutional claims. Pet. App. 62a-72a.

The Second Circuit unanimously reversed. The court first observed that the FEC's construction of § 438(a)(4) raised "'important and troubling First Amendment implications,'" Pet. App. 77a (quoting *National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 194 (D.C. Cir. 1986)(Wright, J., concurring)("*Legi-Tech*")), which were to be avoided, if possible.[1] The court then held that the FEC's determination that the sale of PCD's reports violated § 438(a)(4) "does not serve the congressional purposes of furthering the openness and disclosure purposes of the FECA, while avoiding -- to the extent possible -- the invasions of privacy that would be occasioned by all kinds of solicitation. *We thus cannot say that FEC advisory opinion 1986-25 offered a 'reasonable interpretation' of either its own regulation or § 438(a)(4).*" Pet. App. 87a (emphasis added). In so ruling, the court criticized the "incident to/primary focus" distinction developed in the Advisory Opinion as nothing more than a "we know it when we see it" interpretation of § 438(a)(4). *Id.* Rather, the court held, Congress intended § 438(a)(4) to be applied to expose contributor "information to beneficial sunlight, while protecting contributors, as best as possible, from the harassment of solicitors." Pet. App. 88a. Because PCD's

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[1] In the court of appeals, the FEC apparently recognized that it could not plausibly defend the commercial speech claim it had successfully pressed on the district court. Having abandoned this argument, the FEC itself removed one of the cornerstones of the district court's ruling.

reports are "designed in a manner that will further first amendment values and not infringe contributor privacy by abetting solicitors," *id.*, the court concluded that the FEC's attempt to suppress publication of PCD's reports frustrated "the congressional purpose of furthering the openness and disclosure purposes of FECA," and could not stand. Pet. App. 87a.

The court was also troubled about the First Amendment implications of the FEC's extreme position. As the court pointed out, "[u]nder the FEC's interpretation of the 'principal purpose' requirement, no newspaper could print, for example, a list of contributions made by the top executives of a military contractor who had just received a large government contract (information that would surely be protected by the statute, if not the first amendment)." Pet. App. 89a-90a. The implausibility of this argument led the court to admonish the FEC that "such a reading would plainly be contrary to the broader purposes of FECA, and would very likely run afoul of the first amendment." Pet. App. 90a.

Finally, the court flatly rejected the FEC's assessment that PCD reports were akin to those used by fundraisers for solicitation purposes. "There is little, if any, risk that PCD's lists will result in solicitation or harassment of contributors. The absence from PCD reports of mailing addresses and phone numbers . . . make[s] it virtually certain that these reports will be used for informative purposes (similar to newspapers, magazines, and books, which are 'commercial purveyors of news'), not for commercial purposes (similar to soliciting contributors or selling cars)." Pet. App. 89a (citation omitted).

Having concluded that there was no basis for the FEC's case against PCD, the court reversed the judgment of the district court, and directed the district court "to enter summary judgment for PCD dismissing the FEC's complaint." Pet. App. 91a.

4. *The Attorneys' Fee Litigation.* After the Second Circuit issued its merits decision, PCD's counsel inquired whether the FEC intended to file a petition for certiorari. Pet. App. 5a. In a letter hand-delivered on October 30, 1991, the FEC stated that "the Commission has decided not to seek certiorari." *Id.* PCD then attempted to settle the attorneys' fee issue, but PCD's proposal was rejected by the FEC on December 17, 1991. *Id.* Two days later, PCD filed its fee application, which the FEC opposed for two reasons. *Id.* First, it argued that the application was untimely on the theory that the FEC's October 30 letter constituted a "final judgment" triggering the 30-day EAJA clock. *Id.* The FEC also contended that, despite the unequivocal ruling of the Second Circuit that its position was without merit, it was nevertheless "substantially justified" in bringing this action, and hence a fee award was unwarranted. *Id.*

The district court denied PCD's motion for fees, adopting the FEC's position in its entirety. Pet. App. 14a. The court first held that PCD's fee application was untimely because the FEC's "letter constituted the final judgment for purposes of the EAJA," Pet. App. 21a, and therefore "the time for filing an application for fees and expenses expired" thirty days later. Pet. App. 22a. Alternatively, the court ruled that PCD was not entitled to a fee award because the FEC's position in this case was "substantially justified." On this point, the court canvassed the numerous arguments the FEC had made in this litigation, and explained why, in its view, they were not unreasonable, despite the Second Circuit's explicit findings to the contrary. Pet. App. 23a-34a. The court also reasoned that its prior judgment in the FEC's favor substantiated the reasonableness of the agency's position. Pet. App. 33a-34a.

The Second Circuit once again reversed. On the timeliness issue, the court unanimously held that, since the FEC's letter did not surrender the agency's "absolute right to change its mind and apply for *certiorari*," the district court "erroneously concluded" that the letter "constituted a

final order terminating the civil action." Pet. App. 6a. On the substantial justification issue, the majority, consisting of Circuit Judge Pratt (who had authored the court's merits ruling) and Senior District Judge Whitman Knapp, first reviewed the governing legal principles, including this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988), which directs courts to apply an "historical" inquiry into whether the government's position was substantially justified. Pet. App. 8a.

Having acknowledged the obligation of courts to undertake such an inquiry, the court then concluded that this case presented an "unusual situation," since the prior panel had examined precisely the same source material that the fee panel would have to review in making an historical inquiry into the reasonableness of the FEC's position. In fact, the court observed, the:

> previous panel found the Commission's position unreasonable in light of the plain language and legislative history of the statute. It also found that the lists, compiled without addresses or phone numbers and bearing a warning against commercial use, posed no danger to the privacy interests which § 438(a)(4) was designed to protect. Neither the terms of the statute, its legislative history, nor the evidence concerning the nature of the lists involved were unknown to the Commission when it decided to undertake this litigation.

Pet. App. 9a. In concluding that it should not reexamine a prior panel ruling on precisely the same point, the court relied on a Ninth Circuit decision following the same approach, *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330 (1992) -- a decision which the Solicitor General did not ask this Court to review. The FEC's petition for rehearing and suggestion for rehearing *en banc* were denied without dissent. Pet. App. 36a-37a.

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court for two basic reasons. First, contrary to petitioner's claim, the ruling below does not erect a "*per se*" rule requiring the shifting of fees whenever a court rejects an agency's construction of a statute or regulation it administers. Nor is there any inconsistency between the ruling below and this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988).

Second, the issues presented by petitioner are not sufficiently important to deserve the Court's attention. Even assuming that petitioner is correct that the Second Circuit misapplied *Pierce* -- and it is not -- petitioner's claims regarding the potential mischief that could result from the Second Circuit's ruling are vastly overstated. Moreover, review could not conceivably effect the outcome of *this* case. As the Second Circuit made clear, it believes that the FEC's actions here were legally indefensible under any standard of review. What is more, this is precisely the kind of case Congress envisaged when it enacted EAJA -- an action of dubious legal merit brought by the government that pitted the government's vast resources against those of a fledgling company ill-equipped to defend itself without the prospect of recovering fees. Accordingly, this Court should deny the petition for a writ of certiorari.

I. THE DECISION BELOW NEITHER ERECTS A *PER SE* FEE-SHIFTING RULE NOR CONFLICTS WITH *PIERCE v. UNDERWOOD* OR ANY OTHER DECISION.

Petitioner's principal claim is that the Second Circuit has created a *per se* rule that "transform[s] EAJA into an automatic fee-shifting device whenever the government loses a case on the merits because its interpretation of a statute or regulation it administers is not accepted by a court applying

the usual deferential standard of review." Pet. at 11. That is a gross mischaracterization of the Second Circuit's ruling. There is not a hint in the court's opinion which suggests that it was attempting to lay down a general rule to govern future cases. To the contrary, the court took pains to emphasize the uniqueness of this case, namely one in which a "previous panel has specifically passed on every question" relating to the question of substantial justification. Pet. App. 9a. Thus, the FEC's suggestion that the Second Circuit's opinion creates a *per se* rule of decision that binds future litigants is meritless.[2]

Nor will cases like this arise often in an EAJA context. This Court noted in *Pierce* that the typical EAJA case is *not* one like this case, where a court of appeals has reviewed the case on the merits and issued a detailed opinion. Rather, the vast majority of EAJA fee awards are made in social security cases, which the government loses or concedes in the district court and chooses not to appeal. As *Pierce* noted, "351 of the 387 EAJA awards in fiscal year 1986-1987 were against the Department of Health and Human Services and averaged $2,379," and the volume of EAJA applications has *declined* since *Pierce*. During 1992, only 273 EAJA applications were filed; 252 of these were against the Department of Health and Human Services, "nearly all" of which involved

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[2] Insofar as we can determine, in the nearly seven months since the court of appeals' fee ruling, *no* decision has cited, let alone relied on, the court's ruling on this issue. *See, e.g., SEC v. Kaufman*, 835 F. Supp. 157 (S.D.N.Y. 1993); *Kaleel v. Shalala*, 832 F. Supp. 738 (S.D.N.Y. 1993); *Melbourne Ridge v. Sullivan*, 1993 U.S. Dist. LEXIS 15380 (S.D.N.Y. 1993); *Fine v. Sullivan*, 1993 U.S. Dist. LEXIS 11706 (S.D.N.Y. 1993). In fact, the only case to cite the court of appeals' decision to date referred to its holding on the timeliness of PCD's application; not the merits. *See United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993).

social security determinations. Admin. Office of the U.S. Courts, *1992 Annual Report of the Director*, 92 & Table 26.

Based on its understanding of this typical EAJA litigation, *Pierce* concluded that two factors counseled in favor of an abuse of discretion standard to review district court EAJA determinations: first, the district court generally has superior familiarity with the case, and second, allowing an appellate court to address the merits as part of an EAJA inquiry could distort the "normal law-clarifying benefits that come from an appellate decision on a question of law." 487 U.S. at 560-61. Neither of these elements is present in a case such as this, where the appellate court has actually decided the merits and exercised its "law-clarifying" function.

The problem here -- which underscores the Second Circuit's observation that this was an "unusual situation" -- is not that the Second Circuit failed to give adequate deference to the district court's fee decision, but rather that, in assessing PCD's fee application, the district court refused to heed the Second Circuit's ruling on the merits. That ruling made it clear that the Second Circuit believed that the FEC's position was entirely unjustified and that the flaws in the agency's position were obvious from the outset. Instead of accepting the court of appeals' ruling, as it was obliged to do, the district court used its fee opinion to voice its continuing disagreement with the court of appeals on the merits. Like the district court chastised in *Oregon Natural Resources Council*, the district court here "held fast to its position that the government's interpretation of the statute was reasonable and critiqued the previous panel's reasoning and conclusion." 980 F.2d at 1332. An obstinate refusal by

a district court to apply a court of appeals' ruling is plainly an abuse of discretion.[3]

Nor is there any merit to petitioner's claim that the Second Circuit "reject[ed] application of the historical test for substantial justification" laid down in *Pierce*. Pet. at 14. The fact is that the Second Circuit agreed that such a review was required by *Pierce*; it merely held that the first panel had already engaged in such a review and that it would be inappropriate for a second panel to revisit questions already resolved by a different panel of the court. In the unusual circumstances of this case, that judgment is unassailable.

As framed by this Court in *Pierce*, the operative question under EAJA is "not what the law now is, but what the Government was substantially justified in believing it to have been" when it brought the underlying action. 487 U.S. at 561. But the Second Circuit's ruling on the merits demonstrates that the fee panel correctly concluded that the merits panel did, in fact, examine what the agency believed the law to have been when it brought this enforcement action and concluded that this case was meritless from the outset.

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[3] The district court's defiance is illustrated by examining two pivotal issues in the case. First, the court of appeals explicitly rejected the FEC's claim that PCD's reports could be used for solicitation purposes. Despite this, the district court still insisted that the "FEC reasonably characterized PCD as akin to prohibited list brokers." *Compare* Pet. App. 89a *with* Pet. App. 31a. Second, the court of appeals chastised the FEC for "invent[ing]" the distinction in its Advisory Opinion "between use of contributor data that is 'incident to' the sale [of a publication] and use which is the 'primary focus' of the sale," because the distinction boiled down to a "we know it when we see it" interpretation that was "contrary to both the words of the statute and the act's broader purpose." Once again, notwithstanding the court of appeals' conclusion to the contrary, the district court concluded "that the FEC's position had a reasonable basis in law and was 'substantially justified.'" *Compare* Pet. App. 87a *with* Pet. App. 30a.

There were two basic components to the court of appeals' merits rulings, both of which required the court to examine the reasonableness of the FEC's position when it filed its complaint. First, the FEC's Advisory Opinion and the arguments the agency pressed throughout the litigation, were premised on the notion that PCD's reports were "essentially indistinguishable from those of a list broker used for soliciting contributions." Pet. App. 89a. But the court of appeals flatly rejected this contention, because PCD's reports contained neither mailing addresses nor telephone numbers and because, *prior to filing this case*, the FEC had conducted a survey of over 100 of PCD customers and had found that *none* had used PCD's reports for solicitation purposes. *Id.* Thus, the initial panel had engaged in precisely the kind of review mandated by *Pierce* and had determined what should have been obvious to the FEC before it filed this case: that there was no basis for its factual claim.

The same is true for the FEC's legal theory. In concluding that FEC's reading of its statute and regulations were not reasonable, the merits panel reviewed the authorities that the FEC cited to defend its legal position: the text of the statute, its legislative history, and the D.C. Circuit's opinion in *Legi-Tech*, the only opinion construing § 438(a)(4) at the time the Advisory Opinion was drafted. After carefully reviewing these materials, the court found that the FEC's construction of both § 438(a)(4) and its regulations were not simply in error, but were so unreasonable as to warrant invalidation under the highly deferential standard of review set forth in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

As the second panel stressed, these are precisely the same authorities that would be analyzed in assessing what the agency reasonably believed the law to be at the time the action was commenced:

> In granting summary judgment to appellant [PCD], the previous panel found the Commission's position unreasonable in light of the plain language and legislative history of the statute. It also found that the lists, compiled without addresses or phone numbers and bearing a warning against commercial use, posed no danger to the privacy interests which § 438(a)(4) was designed to protect. Neither the terms of the statute, its legislative history, nor the evidence concerning the nature of the lists involved were unknown to the Commission when it decided to undertake this litigation.

Pet. App. 8a-9a.

In short, the fee panel did not eschew the historical inquiry mandated by *Pierce*. Rather, it found itself in the "unusual situation where a previous panel" had already engaged in that inquiry and "specifically passed on every question before us, and has found the Commission's position to have been unreasonable in that it frustrated the intent of Congress and might jeopardize first amendment rights." Pet. App. 9a. Under these circumstances, it was entirely proper for a second panel to consider and adopt the rulings of a prior panel of the same court. Indeed, doctrines of intra-circuit comity and law of the case counsel strongly against one panel second-guessing another.

Nor does *Pierce* compel a fee panel to revisit issues decided by a prior panel. To the contrary, the fundamental insights that animate *Pierce* point clearly in favor of the approach adopted by the Second Circuit. One important policy goal cited by *Pierce* is the settlement of fee disputes. Yet the FEC's position *encourages* relitigation of the merits at the appellate level, since an agency can escape liability if, in the context of an EAJA fee dispute, the fee panel is compelled to reassess the judgment of the merits panel. Worse, as just noted, the FEC's approach raises the

possibility of two panels of the same court reaching potentially conflicting answers regarding the reasonableness of the agency's position. Finally, *Pierce* emphasizes the need to ensure that fee litigation "does not become 'a second major litigation.'" *Pierce*, 487 U.S. at 581 (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). By insisting on full-scale relitigation of the merits in the context of a fee determination, the FEC's approach stands that goal on its head.

Accordingly, because the court below neither created a *per se* rule that somehow converts EAJA into an automatic fee statute, nor strayed from the teachings of this Court's decision in *Pierce*, review is not warranted.[4]

II. THIS CASE PRESENTS NO RECURRING OR IMPORTANT ISSUES OF FEDERAL LAW AND REVIEW WOULD NOT AFFECT THE OUTCOME.

Even if there were substance to the FEC's argument that the approach applied by the court below was incorrect -- and there is none -- this case still would not warrant review for several reasons.

To begin with, the FEC vastly overstates the significance of the ruling below. As we have explained, the Second Circuit's ruling does not establish a *per se* rule that will pre-determine the outcome in future EAJA cases, a point

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[4] As we have said, there is no basis on which this Court should grant review of the first question presented by the FEC. However, even if the Court were inclined to grant review on the first question, there is no reason for the Court to become enmeshed in the highly fact-bound and case-specific inquiry called for by the FEC's second question, which asks this Court to decide whether the FEC's position in this case was "substantially justified."

confirmed by the absence of any decisions applying the FEC's mythic *per se* rule in the seven months since the Second Circuit's ruling. Rather, the courts have recognized that this case presents an "unusual situation" that does not often recur.

Nor is there the volume of EAJA cases that would merit this Court's concern. As the statistics recounted in *Pierce* and reported by the Administrative Office of United States Courts make evident, there are very few awards under EAJA outside of the social security context, which are seldom appealed on the merits. Consequently, there are limits to the mischief even an erroneous EAJA ruling can cause.

There is also no possibility that review could conceivably have any impact on the outcome of *this* case. As this Court held in *Pierce*, the government's obligation under the "substantial justification" standard is to show that its position, both administratively and before the courts, had a reasonable basis in both law and fact. 487 U.S. at 566 & n.2. But as the discussion above makes clear, the FEC cannot hope to satisfy that test in light of Second Circuit's determination that this case was manifestly without merit, even before the FEC filed this action. To borrow from Judge William's opinion in *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1001 (D.C. Cir. 1987), there is no basis to believe that a remand here will be a wand to turn this "frog into a legitimate prince" for the FEC.

Finally, this is a textbook case for a fee award under EAJA. Congress enacted EAJA in response to its concern that small businesses "may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights." *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989). The purpose of the EAJA fee-shifting provision is "to eliminate for the average person the financial disincentive to challenge unreasonable governmental action." *Comm'r v.*

Jean, 496 U.S. 154, 163 (1990). PCD was placed precisely in that situation. From PCD's perspective, this proceeding was interminable, highly disruptive, and financially ruinous. This proceeding was brought before the FEC in November 1986, and was vigorously litigated before the Commission for nearly three years. PCD was forced to endure extensive discovery and file numerous submissions in order to safeguard its rights. Thereafter, this lawsuit was filed in July 1989 and not concluded on the merits until August 1991. PCD once again had to endure highly burdensome and expensive discovery. For a fledgling company like PCD, five years of intensive litigation against a government agency with unlimited resources to bring to bear -- with the threat of civil penalties hanging in the balance -- exacts a terrible toll. EAJA was enacted to mitigate the harshness of that result, and this Court should not permit the FEC to avoid paying PCD the modest fees -- $50,000 -- it seeks for defending itself in this litigation.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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